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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 VANESSA ALVARADO,
8 o/b/o N.A.V. a minor child,
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10 Plaintiff,
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12 v.
13 COMMISSIONER OF SOCIAL SECURITY,
14
15 Defendant.

No. 4:16-CV-05161-EFS

ORDER GRANTING IN PART
PLAINTIFF'S SUMMARY JUDGMENT
MOTION AND DENYING DEFENDANT'S
SUMMARY JUDGMENT MOTION

CLERK'S OFFICE ACTION REQUIRED

13 Before the Court are the parties' cross motions for summary
14 judgment, ECF Nos. 11 & 12. Plaintiff N.A.V. appeals a denial of
15 benefits by the Administrative Law Judge (ALJ).¹ The Commissioner of
16 Social Security (Commissioner) asks the Court to affirm the ALJ's
17 decision finding Plaintiff not disabled. ECF No. 12.

18 After reviewing the record and relevant authority, the Court is
19 fully informed. For the reasons set forth below, the Court grants in
20 part Plaintiff's Motion for Summary Judgment, denies Defendant's
21 Motion for Summary Judgment, and remands this case to the ALJ for
22 further proceedings.

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26 ¹ Vanessa Alvarado is seeking benefits on behalf of her minor child, N.A.V.
In this Order, the Court refers to N.A.V. as "Plaintiff."

1 I. PROCEDURAL HISTORY²

2 Plaintiff was born on August 29, 2004. Administrative Record
3 (AR) 138. On April 8, 2013, Plaintiff's mother protectively filed an
4 application for supplemental security income on Plaintiff's behalf,
5 alleging that he was disabled due to a learning disorder and attention
6 deficit hyperactivity disorder (ADHD), with an onset date of August 1,
7 2006. AR 138. The application was denied initially and upon
8 reconsideration, and Plaintiff requested a hearing. AR 57, 69, 102.

9 The hearing was held before Administrative Law Judge M.J. Adams
10 in Yakima, Washington, on May 6, 2015. AR 39. In a decision dated
11 June 25, 2015, the ALJ found Plaintiff's severe impairments included:
12 ADHD and a learning disorder. AR 21. The ALJ found that Plaintiff's
13 impairments did not meet or equal a listing. AR 21-22. The ALJ went
14 on to determine that Plaintiff "experiences no more than one marked
15 impairment in the major functional areas" - that being a marked
16 limitation in acquiring and using information. AR 23, 26. As such,
17 the ALJ denied Plaintiff's claims. AR 32.

18 On October 19, 2016, the Appeals Council denied Plaintiff's
19 request for review and the ALJ's decision became final. AR 1. On
20 December 22, 2016, Plaintiff filed this lawsuit, appealing the ALJ's
21 decision. ECF No. 1. The parties subsequently filed the instant
22 summary judgment motions. ECF Nos. 11 & 12.

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25 ² The facts are only briefly summarized. Detailed facts are contained in
26 the administrative hearing transcript, the ALJ's decision, the parties'
briefs, and the underlying records.

1 **II. THREE-STEP PROCESS FOR CHILD DISABILITY**

2 A child under the age of 18 is disabled within the meaning of
3 the Social Security Act "if that individual has a medically
4 determinable physical or mental impairment, which results in marked
5 and severe functional limitations, and which can be expected to
6 result in death or which has lasted or can be expected to last for a
7 continuous period of not less than 12 months." 42 U.S.C.
8 § 1382c(a)(3)(C)(i); *see also* 20 C.F.R. § 416.906. The regulations
9 provide a three-step process to determine whether a claimant
10 satisfies this criteria. 20 C.F.R. § 416.924(a). First, the ALJ must
11 determine whether the child is engaged in substantial gainful
12 activity. 20 C.F.R. § 416.924(b). Second, the ALJ considers whether
13 the child has a "medically determinable impairment that is severe,"
14 which is defined as an impairment that causes "more than minimal
15 functional limitations." 20 C.F.R. § 416.924(c). Third, if the ALJ
16 finds a severe impairment, the ALJ must then consider whether the
17 impairment either "medically equals" or "functionally equals" a
18 listed disability. 20 C.F.R. § 416.924(c), (d).

19 At the third step, if the ALJ finds that the child's impairment
20 or combination of impairments does not meet or medically equal a
21 listing, the ALJ must still determine whether the impairment or
22 combination of impairments functionally equals a listing. 20 C.F.R. §
23 416.926a(a). The ALJ's functional equivalence assessment requires
24 the ALJ to evaluate the child's functioning in six "domains." These
25 six domains are designed "to capture all of what a child can or
26 cannot do," and are as follows:

- (1) Acquiring and using information;
- (2) Attending and completing tasks;
- (3) Interacting and relating with others;
- (4) Moving about and manipulating objects;
- (5) Caring for self; and
- (6) Health and physical well-being.

20 C.F.R. § 416.926a(b)(1)(i)-(vi).

A child's impairment will be deemed to functionally equal a listed impairment if his condition results in "marked" limitations in at least two domains, or an "extreme" limitation in at least one domain. 20 C.F.R. § 416.926a(a). A "marked limitation" is present in a domain if the child's impairment "interferes seriously with [his] ability to independently initiate, sustain, or complete activities."

20 C.F.R. § 416.926a(e)(2)(i). By contrast, an "extreme limitation" is defined as a limitation that "interferes very seriously with [his] ability to independently initiate, sustain, or complete activities."

20 C.F.R. § 416.926a(e)(3)(i).

III. ALJ'S DECISION

At the first step in this case, the ALJ determined that Plaintiff has not engaged in substantial gainful activity since applying for disability. AR 21. At the second step, the ALJ found that Plaintiff "has the following severe impairments: attention deficit hyperactivity disorder ('ADHD') and learning disorder." AR 21. And, at the third step, the ALJ found that Plaintiff "does not have an impairment or combination of impairments that meets or

1 medically equals the severity of one of the listed impairments" AR
2 21.

3 The ALJ found that Plaintiff's learning disorder does not show
4 the requisite sub-average intellectual functioning because
5 Plaintiff's Full Scale Intelligence Quotient score is 90, which is in
6 the low average range. AR 21. The ALJ likewise found that
7 Plaintiff's allegations of disability due to ADHD are not supported
8 by the objective medical evidence. AR 23. The ALJ noted that
9 Plaintiff's school progress reports showed variable results and
10 included a large amount of absences. AR 23, 27. The ALJ also pointed
11 to recent medical reports in which Plaintiff reported that he "has
12 been paying attention in class and not causing disruptions," and that
13 he is "'feeling good' and does not need an increase in his medication
14 dose." AR 24. The ALJ said that "when considered with the other
15 medical evidence of record, the claimant ultimately experiences no
16 more than one marked impairment in the major functional areas."
17 AR 23. The ALJ therefore concluded that Plaintiff is not disabled.
18 AR 31.

19 In arriving at this conclusion, The ALJ gave "little weight" to
20 the evidence presented by Plaintiff's mother, Ms. Alvarado. AR 24.
21 The ALJ found that although Plaintiff suffered from medically
22 determinable impairments that could reasonably be expected to produce
23 the alleged symptoms, "the statements concerning the intensity,
24 persistence and limiting effects of these symptoms are not entirely
25 credible" AR 23. The ALJ said that the most important reason
26 for not giving significant weight to Ms. Alvarado's assessment of

1 Plaintiff's symptoms was "because it is simply not consistent with
2 the preponderance of the opinions and observations by medical doctors
3 in this case." AR 25.

4 The ALJ gave "significant weight," however, to the opinions of
5 the State consultative and reviewing physicians because "their
6 assessments are supported by objective signs and findings upon
7 examination, and in the preponderance of the record at the time they
8 provided their assessments." AR 24. The ALJ adopted the State
9 consultants' conclusions for all six functional-equivalence domains,
10 finding that Plaintiff has (1) marked limitation in acquiring and
11 using information; (2) less than marked limitation in attending and
12 completing tasks; (3) less than marked limitation in interacting and
13 relating with others; (4) no limitation in moving about and
14 manipulating objects; (5) no limitation in caring for self; and (6)
15 no limitation in health and physical well-being. AR 26-31. The ALJ
16 further noted that these domain findings were consistent with the
17 teacher questionnaire completed by Plaintiff's third-grade teacher,
18 Janice Walker. AR 24.

19 IV. STANDARD OF REVIEW

20 This Court will reverse an ALJ's decision only if it was not
21 supported by substantial evidence in the record as a whole or if the
22 ALJ applied the wrong legal standard. *Molina v. Astrue*, 674 F.3d 1104,
23 1110 (9th Cir. 2012). Substantial evidence is "more than a mere
24 scintilla but less than a preponderance; it is such relevant evidence
25 as a reasonable mind might accept as adequate to support a
26

1 conclusion." *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)
2 (quoting *Sandgate v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

3 It is the role of the ALJ, not this Court, to weigh conflicting
4 evidence and make credibility assessments. If the evidence supports
5 more than one rational interpretation, the Court may not substitute
6 its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094,
7 1098 (9th Cir. 1999). The Court will also uphold "such inferences and
8 conclusions as the [ALJ] may reasonably draw from the evidence." *Mark*
9 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). However, if the ALJ
10 applied an incorrect legal standard in weighing the evidence and
11 arriving at his decision, the Court will reverse unless the error was
12 harmless. See *Molina*, 674 F.3d at 1111.

13 V. DISCUSSION

14 Plaintiff seeks judicial review of the Commissioner's final
15 decision denying him benefits. Plaintiff contends that the ALJ
16 reversibly erred by (A) failing to call a medical expert; (B)
17 improperly weighing the testimony evidence and ignoring teacher
18 questionnaires; and (C) improperly assessing the functional
19 equivalence domains. See ECF No. 11.

20 A. Case Review by a Qualified Specialist

21 Section 1382c(a)(3)(I) of the Social Security Act provides:

22 In making any determination under this title . . . with
23 respect to the disability of an individual who has not
24 attained the age of 18 years . . . the Commissioner of
25 Social Security shall make reasonable efforts to ensure
26 that a qualified pediatrician or other individual who
specializes in a field of medicine appropriate to the
disability of the individual (as determined by the
Commissioner of Social Security) evaluates the case of such
individual.

1 42 U.S.C. 1382c(a)(3)(I). The Court of Appeals for the Ninth Circuit
2 has interpreted this provision to mean that "the ALJ is required to
3 make a reasonable effort to obtain a case evaluation, based on the
4 record in its entirety, from a pediatrician or other appropriate
5 specialist, rather than simply constructing his own case evaluation
6 from the evidence in the record." *Howard ex rel. Wolff v. Barnhart*,
7 341 F.3d 1006, 1014 (9th Cir. 2003).

8 After the Ninth Circuit decided *Howard ex Rel. Wolff*, the Social
9 Security Administration issued Social Security Acquiescence Ruling 04-
10 01(9) in response, which included the following:

11 To satisfy this requirement, the ALJ or AAJ may rely on [a]
12 case evaluation made by a State agency medical or
13 psychological consultant that is already in the record, or
14 the ALJ or AAJ may rely on the testimony of a medical
15 expert. When the ALJ relies on the case evaluation made by
16 a State agency medical or psychological consultant, *the*
record must include the evidence of the qualifications of
the State agency medical or psychological consultant. In
any case, the ALJ or AAJ must ensure that the decision
explains how the State agency medical or psychological
consultant's evaluation was considered.

17 AR 04-1(9) at *3, 2004 WL 5846720, 69 FR 22578-03 (S.S.A. Apr. 26,
18 2004) (emphasis added).

19 In this case, the ALJ relied on case evaluations by three
20 separate State agency consultants: Dr. Edward T. Beaty, who prepared a
21 report on June 8, 2012, see AR 52; Dr. Leslie Postovoit, who prepared
22 a report on July 9, 2013, see AR 60; and Dr. Anita Peterson, who
23 prepared a report on November 22, 2013, see AR 69. The only reference
24 to these three consultants' qualifications, however, is the notation
25 "Ph.D. 38" next to each of their names, which indicates that each had
26 a medical specialty in psychology. The fact that all these doctors

were State-agency psychological consultants is highly suggestive that each was fully qualified to conduct a case review.³ Nonetheless, there is no evidence in the record of the doctors' actual qualifications. As such, the Court holds that the ALJ failed to comply with the requirements of AR 04-1(9).

B. Teacher Questionnaires

The ALJ is responsible for deciding functional equivalence after consideration of all evidence submitted. 20 C.F.R. § 416.926a(n). In making this determination, the ALJ considers test scores together with reports and observations of school personnel and others. See 20 C.F.R. §§ 416.924a(a), 416.926a(e)(4)(ii). The ALJ also considers how much extra help the child needs, how independent he is, how he functions in school, and the effects of treatment, if any. See 20 C.F.R. § 416.926a(b). In evaluating this type of information, the ALJ will consider how the child performs activities as compared to other children his age who do not have impairments. *Id.* Often, this

³ The number 38 is the specialization code for psychology. See Social Security Program Operations Manual System, DI 28084.050 (available at <https://secure.ssa.gov/poms.nsf/lnx/0428084050>).

A psychological consultant can be either a licensed psychiatrist or psychologist. [The SSA] will only consider a psychologist qualified to be a psychological consultant if he or she:

- (1) Is licensed or certified as a psychologist at the independent practice level of psychology by the State in which he or she practices; and
- (2) (i) Possesses a doctorate degree in psychology from a program in clinical psychology of an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation; or
(ii) Is listed in a national register of health service providers in psychology which the Commissioner of Social Security deems appropriate; and
- (3) Possesses 2 years of supervised clinical experience as a psychologist in health service, at least 1 year of which is post-masters degree.

20 C.F.R. § 416.1016.

1 information comes from non-medical sources such as parents, teachers,
2 therapists, and others who have regular contact with the child. See,
3 e.g., 20 C.F.R. § 416.913(c)(3), (d); Social Security Ruling (SSR) 98-
4 1p, IV.B. (Sources of Evidence).

5 In this case, Plaintiff's fourth-grade teacher, Norma Jaimes,
6 filled out a questionnaire dated October 25, 2013. Contrary to the
7 ALJ's findings, Ms. Jaimes indicated that Plaintiff has either a
8 "serious problem" or a "very serious problem" with most of the factors
9 relating to "attending and completing tasks." See AR 216.

10 The domain of attending and completing tasks is concerned with a
11 child's ability to focus and maintain attention and ability to see
12 tasks to completion. See SSR 09-4p. A typically functioning school-
13 age child is expected to (1) focus attention in a variety of
14 situations; (2) concentrate on details and avoid careless mistakes;
15 (3) change activities without distracting others; (4) sustain
16 attention sufficiently to participate in group sports, read alone, or
17 complete family chores; and (5) complete a transition task without
18 extra reminders or supervision. SSR 09-4p.

19 After reciting the relevant laws and regulations, the ALJ's
20 entire individualized discussion of the domain of attending and
21 completing tasks is set forth as follows:

22 The education records show many absences from school prior
23 to the claimant's time in the 5th grade, as well as
24 problems with completing homework assignments. However, as
25 discussed above, Ms. Walker's teacher questionnaire, shows
26 that the claimant only had a very serious problem with
completing class or homework assignments. The claimant was
rated as having no more than an obvious problem for the
remainder of the attending and completing tasks domain. In
addition, treatment records show that the claimant has been

1 doing well since increasing the dosage of his medication.
2 The claimant reports that he is passing all of his classes
3 and is paying attention and not disrupting class.
4 According, the undersigned finds less than marked
5 impairment in this domain. This conclusion is also
6 supported by the opinions of the DDS reviewers.
7 AR 27 (internal record citations omitted).

8 In this section of his decision, as well as in other sections,
9 the ALJ referred to the teacher questionnaire that was prepared on
10 June 12, 2013, by Plaintiff's third-grade teacher, Janice Walker.
11 Nowhere in his decision, however, did the ALJ mention the most recent
12 teacher questionnaire, which was prepared by the fourth-grade teacher,
13 Ms. Jaimes on October 25, 2013, and strongly suggests that Plaintiff
14 has at least a marked limitation in the domain of attending and
15 completing tasks. See AR 216. Further, when Dr. Peterson reviewed the
16 case on November 22, 2013, she included specific references to the Ms.
17 Walker's questionnaire in her assessment for each of the six domains,
18 yet she did not address Ms. Jaimes's fourth-grade questionnaire. See
19 AR 75-76.

20 Evidence from a layperson relating to claimant's symptoms
21 "cannot be disregarded without comment." *Nguyen v. Chater*, 100 F.3d
22 1462, 1467 (9th Cir. 1996) (citations omitted). If the ALJ intends to
23 discount the testimony of any lay witnesses, the ALJ "must give
24 reasons that are germane to each witness." *Stout v. Comm'r, Soc. Sec.*
25 *Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006) (quoting *Dodrill v.*
26 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)). Here, the Court cannot be
27 confident that either the State reviewer or the ALJ properly
28 considered Ms. Jaimes's teacher questionnaire in determining that
29 Plaintiff had less than a marked limitation in attending and

1 completing tasks. The Court therefore holds that the ALJ erred by
2 failing to address the highly probative teacher questionnaire.

3 The Ninth Circuit instructs that "where the ALJ's error lies in
4 a failure to properly discuss competent lay testimony favorable to the
5 claimant, a reviewing court cannot consider the error harmless unless
6 it can confidently conclude that no reasonable ALJ, when fully
7 crediting the testimony, could have reached a different disability
8 determination." See *Stout*, 454 F.3d at 1056. Ms. Jaimes's teacher
9 questionnaire identified significant limitations in the domain of
10 attending and completing tasks; properly considered it arguably could
11 have compelled a different disability finding by a reasonable ALJ.
12 Therefore, the ALJ's failure to address the questionnaire constitutes
13 reversible error. See *id.*; see also *Robbins v. Soc. Sec. Admin.*, 466
14 F.3d 880, 885 (9th Cir. 2006) (stating that the Ninth Circuit has
15 never found an error harmless where an ALJ silently disregards lay
16 testimony about how an impairment limits a claimant).

17 The Court remands this case for the ALJ to conduct another
18 review and enter a new decision that addresses all the evidence
19 favorable to Plaintiff, including Ms. Jaimes's teacher questionnaire.
20 As such, this Court need not address Plaintiff's remaining arguments
21 relating to whether the ALJ gave sufficient weight to Ms. Alvarado's
22 testimony and whether the ALJ properly assessed Plaintiff's functional
23 equivalence domains.

24 **C. Remand vs. Award of Benefits**

25 Plaintiff urges the Court to reverse for an immediate award of
26 benefits. The decision whether to remand for further proceedings or

1 reverse and award benefits is within the discretion of the Court. See
2 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An
3 immediate award of benefits is appropriate where "no useful purpose
4 would be served by further administrative proceedings, or where the
5 record has been thoroughly developed," *Varney v. Sec'y of Health &*
6 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay
7 caused by remand would be "unduly burdensome." *Terry v. Sullivan*, 903
8 F.2d 1273, 1280 (9th Cir. 1990). This policy is based on the "need to
9 expedite disability claims." *Varney*, 859 F.2d at 1401. But where
10 there are outstanding issues that must be resolved before a
11 determination can be made, and it is not clear from the record that
12 the ALJ would be required to find a claimant disabled if all the
13 evidence were properly evaluated, remand is appropriate. See *Benecke*
14 *v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004).

15 In this case, the Court is reversing the ALJ's decision simply
16 because the record did not contain the case-reviewers' qualifications
17 as required, and because the ALJ either failed to consider Ms.
18 Jaimes's teacher questionnaire or disregarded it without adequate
19 explanation. It is not clear from the record that the ALJ would be
20 required to find Plaintiff disabled if all the evidence were properly
21 evaluated. As such, the Court remands for further proceedings.

22 VI. CONCLUSION

23 For the reasons discussed above, the Court reverses the decision
24 of the ALJ and remands for further proceedings. On remand, the ALJ
25 should "obtain a case evaluation, based on the record in its entirety,
26 from a pediatrician or other appropriate specialist." *Howard*, 341 F.3d

1 at 1014; see also 42 U.S.C. 1382c(a)(3)(I). If the ALJ relies on any
2 State consultants, he shall ensure that the record contains each
3 consultant's qualifications and explain how each consultant's
4 evaluation was considered.⁴ See AR 04-1(9). Where the ALJ rejects or
5 disregards valid and probative evidence that supports Plaintiff's
6 claims of disability, the ALJ must provide reasons for doing so. See
7 *Nguyen*, 100 F.3d at 1467.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is
10 **GRANTED IN PART**; this matter is **REMANDED** to the agency for
11 further proceedings consistent with this Order.

12 2. The Commissioner's Motion for Summary Judgment, **ECF No. 12**,
13 is **DENIED**.

14 3. The Clerk's Office is to enter **JUDGMENT** in favor of
15 Plaintiff.

16 4. The case shall be **CLOSED**.

17 **IT IS SO ORDERED.** The Clerk's Office is directed to file this
18 Order, enter Judgment for the Plaintiff, provide copies to all
19 counsel, and close the file.

20 **DATED** this 2nd day of October 2017.

21 _____
22 s/Edward F. Shea
23 EDWARD F. SHEA
Senior United States District Judge

24 ⁴ Arguably, the ALJ could satisfy this requirement by simply adding the State
25 consultants' qualifications to the record. The Court notes, however, that
26 the latest consultant's review – performed by Dr. Peterson on November 22,
2013, see AR 69 – is now nearly four years old. The Court therefore
encourages the ALJ to have a qualified specialist conduct a new case
evaluation.